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In the Supreme Court of the United States

October Term, 1976
No. 76-1609

STATE OF INDIANA,

Petitioner

v.

SCOTTSDALE MALL,

Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR THE COMMONWEALTH OF PENNSYLVANIA, AS AMICUS CURIAE IN SUPPORT OF INDIANA'S PETITION

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This brief is submitted pursuant to Rule 42(4) of the Court's Rules by the Commonwealth of Pennsylvania in support of the petition of the State of Indiana to obtain a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit, entered on February 16, 1977.

INTEREST OF THE AMICUS CURIAE

The Commonwealth of Pennsylvania is a sovereign state of the United States with a substantial interest in supporting Indiana's petition for a writ of certiorari in this matter. Pennsylvania is affected by this action because the issues involved bear directly on its right as a State to protect and exercise its sovereign powers. The Court of Appeals held that compliance with federal environmental statutes was necessary in connection with a state highway project even though the state had withdrawn the highway project from federal funding consideration and had returned to the Federal Government all monies it had previously received in connection with the project. Pennsylvania believes that the decision of the Court of Appeals seriously and unduly restricts the well-established right of the States to exercise their sovereign right of eminent domain.

Irrespective of the existence of any Federal-aid highway program, it is clear that the independent States enjoy the right of eminent domain as an element of their sovereignty. *Missippi & R. River Boom Co. v. Patterson,* 98 U.S. 403, 406 (1879). Indeed, the taking of private property for public use upon just compensation is so often necessary for the proper performance of governmental functions that the power is deemed to be *essential* to the life of the State and it cannot be surrendered. *State of Georgia v. City of Chattanooga,* 264 U.S. 472, 480 (1924).

Congress, through 23 U.S.C. §145, has reserved to each State the right ultimately to determine which projects shall be federally funded. This section insures that the Federal-Aid Highway Act will operate to provide Federal assistance to State projects.

The sovereign right of a State to condemn property and construct thereon public roads is not limited in time. A State may choose to program a highway in such a manner as to keep open its option to finance the project with Federal funds. However, a State may also choose to reject or refuse to accept Federal assistance for the project. For these reasons it is clear that a State cannot be barred by the failure of Federal officials to conform to the requirement of Federal law regarding qualification for Federal assistance to State projects. This is because the State has a continuing option to forego Federal assistance to any given State project and proceed using State funds only. Admittedly, in order to qualify for Federal assistance the State project must qualify under applicable Federal statutory law including the appropriate sections of NEPA. However, the remedy for noncompliance with these statutes is a withdrawal of the Federal assistance, and not an injunction against the State which in the exercise of its sovereignty may choose to continue to construct the project with State funds.

The decision of the Court of Appeals is therefore of special concern to Pennsylvania. It is an unwarranted intrusion into the sovereign rights of the States to determine which highway projects are to be federally funded, and results in the suspension of the State's sovereign power of eminent domain.

QUESTION PRESENTED

Must a State comply with the NEPA requirement of filing an environmental impact statement prior to completion of a highway project which had initially been programmed for Federal aid, if the State withdraws its request for Federal funding and returns the Federal money, prior to the submission of plans, specifications and estimates to the Secretary of Transportation?

STATEMENT OF THE CASE

The State of Indiana has presented a fully detailed statement of the case in its Petition. The Commonwealth of Pennsylvania adopts Indiana's statement of the case.

REASON FOR GRANTING THE WRIT

The decision of the Court of Appeals presents important questions concerning statutory construction and federalism regarding the relationship between the National Environmental Protection Act and the Federal-aid highway program for state highway construction. The decision of the Court of Appeals is, in effect, an unempowered usurpation of the sovereign powers inherent in the States and as such cannot be countenanced. This Court has not yet considered these questions and the impacts resultantly generated.

The National Environmental Protection Act (NEPA), 42 U.S.C. §4321, et seq. requires that for any "major federal actions significantly affecting the quality of the human environment" the responsible Federal official must prepare a detailed statement of the effect of such action on the environment and of the alternatives available. It cannot be too strongly stated that NEPA does not and cannot apply directly to the States. The Fourth Circuit Court of Appeals has succinctly stated the rule:

> "The short answer . . . is that . . . NEPA . . . impose(s) no duties on the states and operates(s) only upon the federal agencies. . .
>
> "Appellants baldly attempt to stretch rights, protected *by law against infringement by federal agencies only*, to cover the states and their officers in disregard of the plainly limited character of the

> legislation." (Emphasis added.) *Ely v. Velde*, 451 F.2d 1130, 1139 (4th Cir. 1971).

While 42 U.S.C. §4332(2)(D) as amended in 1975 provides that in enumerated circumstances the fact that the detailed statement required under subparagraph C had been prepared by a State agency would not render the statement legally insufficient, this section expressly does not relieve the Federal official of his responsibility for the entire statement. This section is merely reflective of the cooperation between State and Federal agencies in the use of Federal funds.

Pursuant to NEPA, the Federal Highway Aid Program, 23 U.S.C. §101 et seq. requires that a State highway agency designing a highway project eligible for Federal funds complete an environmental statement prior to the selection of a particular location. Therefore, a State highway agency may only preserve its eligibility for Federal highway aid by complying with each of the three phases of the Federal Highway Act. Each stage must be successfully completed before a State can timely request Federal money from the Federal Highway Administration.

During the first phase of the application process pursuant to 23 U.S.C. §103 the State designates a proposed highway project as falling into one of several highway systems. Thereafter, pursuant to 23 U.S.C. §105 a State may program a project for Federal funds. The third step of the process in a State's application for funding occurs when the State agency submits plans, specifications and estimates for approval by the Secretary of Transportation

pursuant to 23 U.S.C. §106(a). Approval of the plan specifications and estimates by the Secretary of Transportation is deemed a contractual obligation of the Federal Government for the payment of its proportional contribution. See *Monroe County Conservation Council v. Volpe*, 472 F.2d 693 (2 Cir. 1972). Congress, at 23 U.S.C. §145 has specifically reserved to each State the right to determine which of its projects shall be federally funded.

This brief review of the governing statutes indicates that NEPA does not apply directly to the States and that under the Federal Aid Highway Program, Congress has specifically left to the States the power to choose which of their roads will be federally funded.

It is contended here that the programming of a highway for possible Federal funding by a State, the attendant compliance with the applicable Federal statutes and the rules from the Federal Highway Administration (FHWA) at the various stages do nothing more than preserve the State option to seek the Federal funds. If that State at some point fails to comply, it has thereby lost the opportunity for Federal funding of the project. Therefore, in order to maintain its option of utilizing Federal funds on particular projects, the statutes must be complied with. However, none of this binds the State to accept the Federal funds. A State may choose to withdraw or to deprogram a project from Federal funding, at any time, and not be bound by NEPA. Pensylvania joins in the State of Indiana's contention that there is no indispensable Federal involvement in the construction of primary highways, Moreover, regarding the Federal-aid primary highway system, the only major Federal action involved is the financing of the highway in part with Federal funds and not the construction of the highway. Therefore, if at any time a State withdraws a project from Federal financing there can be no major Federal action since there is no control exercised over the project by the Federal Government. That the important factor in determining whether an action is a "major federal action" under NEPA is the extent of federal control over the action is supported by both case law and the Council on Environmental Quality (CEQ) guidelines. See, *Rover v. Richmond Metropolitan Authority*, 359 F. Supp. 611 (E. D. Va.), *aff'd. per curiam*, 481 F.2d 1280 (4th Cir. 1973). CEQ is the agency responsible for assisting other agencies in complying with NEPA and part of its guidelines reads as follows:

> "The words 'major' and 'significantly' are intended to imply thresholds of importance and impact that must be met before a statement is required. The action causing the impact must also be one where there is *sufficient Federal control* and responsibility to constitute 'Federal action' in contrast to cases where such *Federal control* and responsibility are not present. . . ." (Emphasis added.) 40 C.F.R. §1500.-6(C)

The Court of Appeals in the instant case felt compelled to dismiss the above argument because of the strong admonition of Congress contained in NEPA as follows:

> "The Congress authorizes and directs that to the fullest extent possible . . . the policies, regulations, and public laws of the United States shall be inter-

preted and administered in accordance with the policies set forth in [NEPA]. . . ." 42 U.S.C. §4332.

The Court of Appeals mistakenly concluded that this expression of congressional will requires that at a point in the ongoing Federal-State relationship under the Federal Aid Highway Act the requirements of NEPA must be met. Again, the Court of Appeals failed to recognize that NEPA, and hence the above-cited section, simply does not apply directly to the States.

The admonition contained in §4332 does not mandate that at a point in the ongoing Federal-State relationship under the Federal Aid Highway Act the requirements of NEPA must be met if and when a highway project is totally withdrawn from Federal funding. The Court of Appeals refused to consider the action of withdrawing the project from the Federal funding a crucial factor, and concluded that the preliminary Federal-State dealings and Indiana's compliance with the applicable Federal statutes and regulations constituted a major Federal action, because of this strong admonition of Congress. This refusal by the Court of Appeals has resulted in the suspension of the sovereign powers of the State of Indiana and further violates the expressed policy of Congress that is embodied at 23 U.S.C. §145, which specifically reserves to each State the right to determine which of its projects shall be federally funded. When the Court of Appeals reinstated the injunction prohibiting the State of Indiana from proceeding further with the highway project rather than enjoining the use of Federal funding for the project, the Court then made an unwarranted incursion into the sovereign powers of the State and further created a series of anomalous situations.

Here then, the sovereign power of a State to exercise eminent domain, a power vital to the very existence of the State, and a power which may not be waived, has not only been curtailed but also destroyed under color of a statute which does not even apply directly to the State and, in fact, may not be made to do so, *National League of Cities v. Usery*, —— U.S. ——, 96 S. Ct. 2465 (1976). While that case reviewed the power of Congress to enact statutes, the same reasoning would apply to this case where a Court within the Federal system has interpreted a statute to render a similar result. In *Usery*, it is plainly seen that this Court properly recognizes the integrity of the States and their ability to function effectively within the Federal system of our Nation. In citing Chief Justice Chase, this Court recognized that the structure of the Constitution presupposes an indestructible Union composed of indestructible States. Further this Court recognized that neither government may destroy the other nor curtail in any substantial manner the exercise of its powers. *Metcalf & Eddy v. Mitchell*, 269 U.S. 514 (1926).

It is clear that the Court of Appeals in ordering the injunction in the present case has not only curtailed the sovereign power of the State of Indiana but has also destroyed the State's ability to exercise eminent domain for that particular project. This is exactly what this Court has held that Congress may not do and therefore a Federal District Court in interpreting a Congressional enactment likewise may not do.

It is clear that the only proper remedy in a situation where the use of Federal funds is about to be made and the applicable Federal statutes have not been complied with is an injunction prohibiting the use of the Federal

funds for that particular project; and not an injunction prohibiting the State from any further work with its own funds upon the project. In *Ely v. Velde*, 451 F.2d 1130, 1139 (4th Cir. 1971) the Court of Appeals for the Fourth Circuit, recognizing that nothing had been done to irretrievably characterize the construction of a penal reception and medical center itself as a Federal project, declined to enjoin the State defendants from proceeding with the construction. *See also, Proetta v. Dent*, 484 F.2d 1146 (2d Cir. 1973); *Bradford Township v. Illinois State Toll Highway Authority*, 463 F.2d 537 (7th Cir.), cert. denied, 409 U. S. 1047 (1972); *Citizens for Food and Progress, Inc. v. Musgrov*, 397 F. Supp. 397 (M.D. GA. 1975); *Citizens Civic Association of Door County v. Coleman*, 9 ERC 1622 (W.D. WI. 1976).

Finally, it is appropriate to point out to this Court other anomalies created by the opinion of the Court of Appeals in the instant case. The Court of Appeals has enjoined any work on the bypass until a proper environmental impact statement has been submitted. However, at this point the United States Department of Transportation has accepted the State of Indiana's withdrawal of the request for funding and would further be required to deny funding as noted by the District Court since the State of Indiana has not obtained an environmental impact statement at the location stage and therefore has failed to comply with 23 C.F.R. §771.5(e). Since the State of Indiana, as noted, above has no authority to prepare or submit an Environmental Impact Statement (EIS) the order of the Court of Appeals requires the United States Department of Transportation to present an EIS for consideration and approval even though it has no interest in

the project at this time and was previously dismissed from this litigation. Therefore the decision of the Court of Appeals results in compelling the Federal Government, which was already dismissed from the proceedings, to expend resources to complete EIS studies on a project that cannot possibly receive Federal funding or in the alternative compelling the State of Indiana to submit, on its own, an EIS for which there is no statutory authority, and, in fact, would violate the clear expression of Congress contained in 42 U.S.C. §4332(2)(D). This situation should not be permitted to exist.

It is important, therefore, that a writ of certiorari be granted in this case. The decision of the Seventh Circuit Court of Appeals in the instant case has resulted in the destruction of the sovereign rights of the State of Indiana and is violative of the expressed policy of Congress. It is important to the Commonwealth of Pennsylvania and to the interest of federalism, that this case be reviewed.

Reason for Granting the Writ

CONCLUSION

For all the reasons set forth above, the Commonwealth of Pennsylvania respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in these proceedings on the 16th day of February, 1977, to resolve a serious issue of the impairment of the sovereign powers of the State and an issue of federalism that is of grave importance to the States.

Respectfully submitted,

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